

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	
)	No. 63266-3-I
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
JESUS SILVA,)	
)	
Appellant.)	FILED: <u>March 1, 2010</u>
)	

Schindler, C.J.— The State charged Jesus Silva with one count of unlawful imprisonment – domestic violence, one count of robbery in the second degree – domestic violence, and two counts of assault in the fourth degree – domestic violence. The complaining witness Mejia Silva, testified that Silva forced her to go with him to Yakima, that he took her money, and he hit her in the face two times. Silva denied Mejia’s allegations, but he admitted accidentally hitting Mejia one time. The jury convicted Silva of the lesser included offense of theft in the first degree – domestic violence, and of one count of assault in the fourth degree. The jury found Silva not guilty on the other assault charge and unlawful imprisonment. Silva contends the court abused its discretion in denying motions for a mistrial after Mejia testified that

Silva had been in jail before, and after she testified that “I am afraid when he gets out because on one occasion he told me that he--.” In each instance, the trial court instructed the jury to disregard the testimony. Because the inadvertent remarks were not so serious as to warrant a mistrial and the jury is presumed to follow the instructions, we conclude the trial court did not abuse its discretion in denying the two motions for a mistrial, and affirm.

FACTS

Jesus Silva and Elvia Mejia have been involved in a tumultuous on and off again relationship since 2001. Silva and Mejia have two children together.

In July 2008, Mejia and the children were living with Silva at his aunt Antonia Silva’s house in Kent. According to Mejia, although she wanted to move out, he “wouldn’t allow me to leave.”

On July 10, Mejia and Silva drove to Yakima together. The children stayed with Silva’s aunt Antonia Silva. According to Silva, he needed to go to Yakima to get the money a friend owed him. Mejia testified that Silva “force[d] me to go with him to Yakima, and in an aggressive way to get into the car with him when I told him that I didn’t want to go with him. . . . I was afraid that he was going to do something to me.”

Mejia testified that while Silva was driving, he tried to take her purse away from her, but she held onto it. Mejia said that Silva told her twice in an angry tone to give him the purse. According to Mejia, when she refused, Silva grabbed the purse, took about four hundred dollars out of the purse, and put the money in his pocket. Silva then threw the purse out the car window.

Mejia testified that after taking the money, Silva hit her two different times with his fist. Mejia said that Silva hit her on the left side of her face when she was crying. Mejia said that when she tried to get out of the car, Silva locked the doors and yelled at her, “that I should shut up my muzzle, that I was a whore, and he was not going to let me get out of the car, that I was going to go with him.” After she continued to cry, Silva hit her in the mouth, splitting her lip.

Before reaching Yakima, Silva stopped at a rest stop. Silva took a shirt from the trunk and told Mejia to change into it. Silva threw away Mejia’s bloodstained shirt at the rest stop and wiped blood off the seat with a towel.

When they arrived at the motel in Yakima, Silva told Mejia to stay in the car. After Silva got out of the car, Mejia ran to the motel lobby. Mejia called 911. Silva drove away.

Mejia told the 911 operator that her ex-boyfriend hit her and split her lip “and he had threatened me on the road that he wanted to kill me. . . .” Mejia also told the officers about the money Silva took from her purse. The police took Mejia to the hospital, where she received stitches for her split lip.

Mejia called Silva’s sister Sylvia. Sylvia Silva drove to Yakima with her husband and cousin and picked up Mejia at the hospital. While driving out of Yakima, Mejia noticed Silva’s car in a parking lot at a nightclub near the highway. Mejia called 911 to report the car’s location.

Police officers arrested Silva at the nightclub. Silva had \$393 in his pocket. The police found a towel with dried blood in the car and bloodstains on a seatbelt on

the passenger side.

The State charged Silva with one count of unlawful imprisonment – domestic violence,¹ one count of robbery in the second degree – domestic violence,² and two counts of assault in the fourth degree – domestic violence.³

Before trial, Silva filed a motion to exclude evidence under ER 404(b) of “several previous incidents of alleged domestic violence.” The State agreed not to introduce any evidence of “unreported history of the defendant’s violence and threatening behavior.”

Silva’s defense at trial was that Mejia was not credible and that she went to Yakima willingly. Silva also claimed that he did not take any money from her, and that he accidentally hit her one time.

Mejia and three police officers testified for the State. The recording of Mejia’s 911 call from the motel was admitted into evidence and played for the jury. Police photographs of Mejia’s face and clothes, and of Silva’s car, were also admitted into evidence.⁴

Silva moved for a mistrial two different times during Mejia’s testimony. Silva first moved for a mistrial after Mejia testified that he “was in jail” while she was living in Mexico several years earlier.

Q. Ms. Mejia, if you could estimate, and this might be a hard

¹ RCW 9A.40.040.

² RCW 9A.56.190, .210.

³ RCW 9A.36.041.

⁴ A transcript of the 911 call was also admitted.

question, but how many times do you think that you and Mr. Silva broke up and then got back together, or you left and then came back over the course of your relationship?

A. About five times.

Q. And during those times that you moved out and were not with Mr. Silva, were you still in contact with him?

A. Yes, sometimes.

Q. You talked about being in Mexico a few minutes ago. When did you go to Mexico?

A. Do I have to give you the date?

Q. How about I'll make it more specific. You have two children at that point or just one?

A. One.

Q. And it was Christopher. Did he go to Mexico with you?

A. Yes.

Q. And where was Mr. Silva living when you went to Mexico?

A. He was in jail.

The State argued that Mejia's remark about jail was inadvertent and could be cured by a limiting instruction. The court agreed with the State, and denied Silva's motion for a mistrial.

I have looked at State vs.] Condon and Shepardized it. The discussion about the issue in this case, which is essentially on point, is Condon contends that the trial court erred in denying his motion for a mistrial based on the witness'[s] reference to the fact that Condon had been in jail. And at headnote seven and eight, an irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial. And the factors to be considered include the seriousness of the irregularity, whether the statement in question was cumulative of other evidence properly admitted, and whether the irregularity could be cured by an instruction to disregard the remarks, and an instruction which a jury is presumed to follow.

This statement here has not been cumulative. It was an unexpected response, and there is no claim that it was other than that. The irregularity itself . . . did essentially and unexpectedly violate the understanding prior to the trial starting. That is, that there would be no 404(b) or 609 evidence. This irregularity is the type that I believe can be cured by a specific instruction. And the case in Condon the mistake was made twice, and then the witness was instructed outside the presence of jury and a limiting

instruction was made. And I am satisfied that this case is the one on point, as opposed to cases cited and distinguished in Condon such as Escalona, in which, for example, in Escalona during cross-examination the victim stated that on the day of the stabbing he was nervous when he saw the defendant because the defendant already had a record and had stabbed someone. The motion for a mistrial was denied, and it was reversed. Here the court stated the reference to Condon having been in jail was much more ambiguous. 'The mere fact that someone has been in jail does not indicate a propensity to commit murder,' which was the point of your argument, 'and the jury just as easily could have concluded that Condon was in jail for a minor offense. Also, the fact that someone has been in jail does not necessarily mean that he or she has been convicted of a crime. . . .'

The court instructed the jury to disregard Mejia's remark about jail:

A reference has been made by this witness to the defendant having been in jail. Such a reference is not evidence that the defendant has been convicted of a crime. You are to completely disregard such reference, and such reference should not be considered by you in any way.

During Mejia's testimony, Silva made several other objections. Silva objected when Mejia testified about why she went outside with her purse before the trip to Yakima. Mejia stated that she was "thinking of leaving" but did not want to leave the children because Silva once had "hidden them away in Mexico." The court sustained Silva's objection and instructed the jury to disregard the testimony.⁵ Mejia also described Silva as "aggressive" during the time they lived at his aunt's house, but the court overruled Silva's objection.

Silva made a second motion for a mistrial after Mejia testified she was fearful of Silva because on one occasion "he told me that he—." Mejia testified as follows:

Q. Ms. Mejia, you said that when you were at the motel in Yakima

⁵ "[T]he previous question and the previous answer are stricken and you are not to consider them for any purpose."

and you called 911, that the defendant tried to come talk to you. What happened when he tried to come talk to you?

A. He only opened the door of the lobby, and he said that he wanted to talk to me, but I told him to, no, to leave. . . . that I was going to call the police, that I was never going to forgive him for what he had done.

Q. Ms. Mejia, what did the defendant do after you had that conversation with him?

A. He left in the car.

Q. Okay. Ms. Mejia, I just have one more question. How do you feel about the defendant now?

Silva objected to the question. Following a sidebar conference, the prosecutor again asked:

Q. Ms. Mejia, I believe I asked you just right before that break how you feel about the defendant now[?]

A. That I don't love him, that I am afraid when he gets out because on one occasion he told me that he--

The court interrupted. Mejia did not testify about why she was fearful or what Silva told her "on one occasion."

Silva moved for a mistrial. Silva argued that a mistrial was warranted because the "[c]umulative effect of the jail remark and this remark, along with a couple of other sort of borderline remarks during the testimony, I think given the clear implication to the jury that there are prior allegations of domestic violence by Ms. Mejia against Mr. Silva." The court denied the motion for a mistrial. The court instructed the jury that "the initial part of the answer was I don't love him. The balance of the phrase is stricken and you are not to consider that balance of the phrase for any purpose."

Silva, his aunt Antonia Silva, and his sister Sylvia Silva testified for the defense. Silva testified that while driving, Mejia became very angry about his plans to

get together with a friend in Yakima. Silva said that when she tried to grab the steering wheel from him, he hit her. “I didn’t intend to hit her the way I did, but -- but it was a very fast reaction.”

Antonia Silva testified that Mejia appeared “quite happy” on the day Mejia and Silva left her to go to Yakima, and that Mejia asked her to take care of the children while they were gone. Sylvia Silva testified that during the trip back from the hospital in Yakima, Mejia told her that Silva accidentally hit her. According to Sylvia Silva, Mejia said that “she tried to move the [steering] wheel, and then . . . [h]e tried to not have her move it, so accidentally he hit her on the mouth.”

As to the charge of robbery in the second degree, the court instructed the jury on the lesser included offense of theft in the first degree.⁶ The jury found Silva guilty of theft in the first degree – domestic violence, on one count of assault in the fourth degree – domestic violence. The jury found Silva not guilty of unlawful imprisonment – domestic violence, and the second assault charge.

ANALYSIS

Silva argues the court abused its discretion in denying the two motions for a mistrial. Silva contends Mejia’s testimony that he had been in jail, and that she was “afraid when he gets out because on one occasion he told me that he--,” improperly referred to prior acts of misconduct and denied him the right to a fair trial.

A trial court's decision to deny a motion for mistrial is reviewed for an abuse of discretion. State v. Jackson, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). A trial court

⁶ RCW 9A.56.030.

abuses its discretion in denying a motion for a mistrial only if its decision is manifestly unreasonable or based on untenable grounds. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006).

Trial courts have broad discretion to rule on irregularities during the course of a trial. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). The trial court is in the best position to determine if a trial irregularity caused prejudice. State v. Ford, 151 Wn. App. 530, 538, 213 P.3d 54 (2009). The court should grant a mistrial “only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). Ultimately, we will reverse the trial court only if there is a substantial likelihood the trial irregularity prompting the mistrial motion affected the jury's verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002).

Whether an inadvertent remark requires reversal depends on: (1) the seriousness of the irregularity; (2) whether the statement in question was cumulative of other admissible evidence; and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow. State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983).

Silva contends that in denying the motions for a mistrial, the court erred in relying on State v. Condon, 72 Wn. App. 638, 865 P.2d 521 (1993). We disagree. In Condon, a witness made three separate remarks stating or suggesting that the defendant had been in jail. Condon, 72 Wn. App. at 648. The trial court sustained the defendant's objection and instructed the jury to disregard the remarks. Condon,

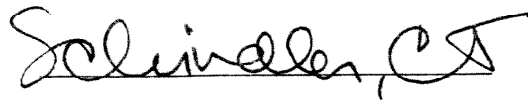
72 Wn. App. at 648. This court affirmed the trial court's denial of a motion for a mistrial, concluding that the witness's remarks were ambiguous and did not indicate the defendant had a propensity to commit the charged crime or that he had even been convicted of a crime. Condon, 72 Wn. App. at 649. "Thus, although the remarks may have had the potential for prejudice, they were not so serious as to warrant a mistrial, and the court's instructions to disregard the statements were sufficient to alleviate any prejudice that may have resulted." Condon, 72 Wn. App. at 649-50.

Here, as in Condon, although Mejia's reference to jail and being afraid "when he gets out" had the potential for prejudice, the improper remarks were inadvertent and ambiguous, and were not so serious as to warrant a mistrial because the court instructed the jury to disregard the statements. We presume the jury follows the court's instructions. State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). And here, the jury verdict finding Silva guilty of a lesser included offense, and only one of the two assault charges, strongly suggests that the jury followed the court's instructions.

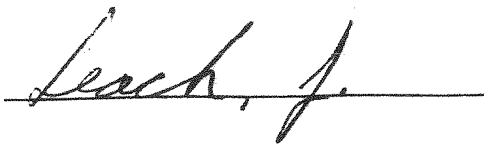
Silva cites State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987), to argue that the court's instructions could not cure the effect of Mejia's improper remarks. Escalona is distinguishable. In Escalona, the complaining witness testified that the defendant "already has a record and had stabbed someone." Escalona, 49 Wn. App. at 255. Although the trial court struck the remark and gave a limiting instruction, we held the court abused its discretion in denying the defendant's motion for a mistrial and reversed the defendant's conviction for assault with a deadly

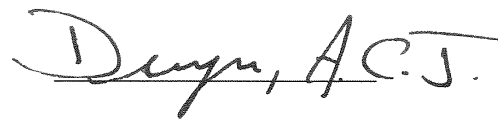
weapon, a knife. Escalona, 49 Wn. App. at 255-57. Although the improper remark in Escalona was inadvertent, we concluded that it was “extremely serious” and could not be cured by an instruction to disregard the testimony. Escalona, 49 Wn. App. at 255. “[D]espite the court’s admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact . . . and conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past.” Escalona, 49 Wn. App. at 256. As previously discussed, here, the inadvertent remark was not so serious as to warrant a mistrial.⁷

On this record, the court did not abuse its discretion in denying the motion for a mistrial, and affirm.



WE CONCUR:





⁷ Silva also asserts that Mejia’s testimony that he once hid the children from her in Mexico, and that he was “aggressive,” were improper remarks that were part of the basis for his second motion for a mistrial. The record does not support Silva’s assertion. Silva’s general reference to “borderline remarks” in his second motion for a mistrial did not specifically refer to the improper remarks he contends were a basis for the motion for a mistrial. See State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985).